

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7125

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT A. McAULIFFE
Plaintiff Appellee

V.

ADOLF G. CARLSON
Defendant Appellant

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT APPELLANT TO
BRIEF OF PLAINTIFF-APPELLEE-APPELLANT

Appellant:

CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, Connecticut

Maurice Myron
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

Paige J. Eyerin
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut



TABLE OF CONTENTS

	PAGE
Issue	1
Argument	2
The District Court Did Not Abuse Its Discretion In Not Awarding Attorneys' Fees	2
Conclusion	4

TABLE OF CITATIONS

PAGE

Federal Cases Cited:

Bridgeport Guardians, Inc. v. Members, 497 F.2d 1113 . . .	3
Hall v. Cole, 412 U.S. 1	2
Jordan v. Fusari, 496 F.2d 646	3
Stolberg v. Trustees, 474 F.2d 485	3

Other Authorities:

6 Moore's Federal Practice	2
--------------------------------------	---

1.

ISSUE

The issue is whether it was error for the District Court not to have awarded attorneys' fees to the plaintiff.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN NOT
AWARDING ATTORNEYS' FEES.

"Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of this equitable powers may award attorneys' fees when the interests of justice so require.

Under the facts of this case, we cannot say that the District Court abused that discretion." Hall
v. Cole, 412 U.S. 1,4.

When the matter of attorneys' fees is presented to the District Court where the case has been tried, that Court is called upon to exercise its discretion, and only in exceptional cases and for dominating reasons of justice can the exercise of that power by the district court be justified. 6 Moore's Federal Practice §54-77[2].

In this case, Judge Newman considered the facts, used his discretion, and concluded that an award of attorneys' fees was

not appropriate, citing Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 497 F.2d 1113 (2d Cir. 1974), which is particularly applicable. It was there held at page 1115:

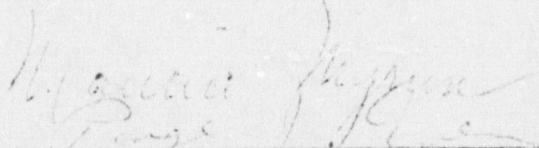
"Plaintiffs further urge that the court below abused its discretion by refusing to grant counsel attorneys' fees as part of costs. The district court found that it had discretion to award attorneys' fees, but declined to exercise it here since the litigation was not compelled by the defendants 'unreasonable, obdurate obstinancy', the test employed by this court in Stolberg v. Trustees for the State College of Connecticut, 474 F.2d 485,490 (1973). While attorneys' fees are permitted in actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., by express statutory authorization, 42 U.S.C. §2000e-5(k), the failure of Congress to provide for such fees in §1983 cases is, in our view, significant. While we do not rule out the possibility that counsel fees might be appropriate in some §1983 cases, even absent statutory authority, we see no reason to reverse the determination below denying them. In Jordan v. Fusari, 496 F.2d 646,650 (2d Cir. 1974), this court remanded the question of the propriety of legal fees in a §1983 action to the district court in view of the inadequacy of the record before the district judge in that case. There is no such problem here. The trial judge was fully aware of all of the facets of this case, the contribution made by counsel for plaintiffs, as well as the reasonableness of the resistance to the plaintiffs' claims by the defendants. We do not find any abuse of discretion."

The plaintiff, here, makes mention of three theories: penalty, fund, and private attorney general, complaining that Judge Newman based his decision on the first two but not the last. It is not suggested that he failed to exercise his discretion, but only that he failed to adopt a theory which the plaintiff considers appropriate. If the assumption is made that attorneys' fees may be awarded on any one of three bases, and that such award is predicated upon the discretion of the court, it would be a peculiar kind of discretion that restricted the court to only one of those choices. It would be no discretion at all.

CONCLUSION

That part of the judgment denying plaintiff's motion for attorneys' fees should be affirmed.

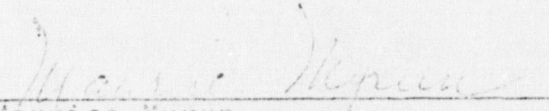
Respectfully submitted,


Maurice Myron
Paige J. Everin
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

CERTIFICATION

I hereby certify that two copies of the foregoing Reply Brief were mailed to the following counsel of record on the 2nd day of May, 1975:

Michael J. Churgin, Esquire
Stephen Wizner, Esquire
Dennis E. Curtis, Esquire
127 Wall Street
New Haven, Connecticut 06520



Maurice Myron
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

MACALDAM BOND

MADE IN U.S.A.

MACALDAM BOND